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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1405

DEMOCRATIC NATIONAL COMMITTEE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF INTERVENOR NATIONAL BROADCASTING COMPANY, INC. IN OPPOSITION

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BRIEF OF INTERVENOR NATIONAL BROADCASTING COMPANY, INC. IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is not officially reported yet. It is reprinted as Appendix A (pp. 1a-42a) of the petition for certiorari. The opinion of the Federal Communications Commission, which was affirmed by the Court of Appeals, is reported at 31 F.C.C. 2d 708 (1971). It is reprinted as Appendix C (pp. 43a-55a) of the petition for certiorari.

JURISDICTION

The judgment of the Court of Appeals was entered on February 2, 1972. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that the fairness doctrine does not require that a licensee make equal time available to the opposition party every time the President appears on television?

2. Whether the Court of Appeals correctly held that petitioner was not entitled to raise its burden of proof claim for the first time on appeal?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 315 of the Communications Act of 1934 (47 U.S.C. § 315) provides in pertinent part as follows:

> "(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed

upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views of public importance."

STATEMENT OF THE CASE

This case involves four fairness doctrine complaints filed by the Democratic National Committee (hereinafter "DNC"), in which DNC, claiming that as the "opposition party" it was entitled to an automatic right to respond to Presidential television appearances, sought free time to respond to the following:

1. An NBC interview of the President by Barbara Walters on the March 15, 1971 "Today" program.

2. An ABC interview of the President by Howard K. Smith on March 22, 1971.*

* The ABC interview is described more fully in the briefs for the FCC and ABC.

3. An April 7, 1971 Presidential speech on the Indochina war. The speech was carried simultaneously on NBC, CBS and ABC.

At the time of these broadcasts, the President had not yet announced that he would be a candidate for reelection in 1972, and thus the "equal opportunities" requirement of Section 315 of the Communications Act did not apply. See *McCarthy* v. *FCC*, 390 F.2d 471 (D.C. Cir. 1968).

The March 15, 1971 "Today" Program

On March 15, 1971, President Nixon was interviewed by Barbara Walters on the NBC morning "Today" program. The interview dealt mainly with the President's views on the role of women, Mrs. Nixon's influence on his career, the role of other First Ladies, women reporters, women in government, and the American family.

On March 30, 1971, NBC denied DNC's request for "equal time" on the "Today" program to respond to the President (J.A. 1)*, and DNC filed a complaint with the Federal Communications Commission (hereinafter "FCC"). The gist of the complaint was not that NBC had failed to provide balanced coverage on any particular issue, such as the economy or the Indochina war, but rather that "[t]he personality of Richard Nixon is, in practical and psychological terms, no less a political issue than his views on the economy or the war in Vietnam." (J.A. 7) In a marked departure from traditional fairness complaints alleging lack of balanced coverage with respect to a particular issue, DNC's complaint stated as follows:

> "By this letter, we request the Federal Communications Commission to recognize that *personality*

* "J.A. ——" references are to the Joint Appendix in the Court of Appeals, a copy of which has been filed with the Clerk of this Court.

appearances by the man who holds the highest political office in this land are part of a campaign for reelection that our newspapers and politicians know has already begun. * * * This is a situation, pure and simple, where the President is selling the public *personality* of his private life to the American people. Much as we might wish that every American votes solely on the issues, we must recognize legally, as we recognize practically and psychologically, that millions of Americans vote on the basis of *personality* —and that the *personality* of the President on the 'Today' show was one of the opening guns in the selling of the President in 1972." (J.A. 6-7) (emphasis supplied)

The April 7, 1971 Indochina Speech

On April 7, 1971, the President appeared on the major television networks (NBC, CBS and ABC) to address the nation on the war in Indochina. The President, among other things, claimed success for his Vietnamization program and the military incursions into Cambodia and Laos. He also stated his reasons for opposing a firm date for the withdrawal of American forces from Vietnam.

On April 8, 1971, DNC sent a telegram to NBC requesting free prime time to respond to the President's address on the Indochina war. (J.A. 11) By telegram dated April 12, 1971 NBC denied DNC's request. (J.A. 12) Recognizing its obligation to present contrasting viewpoints on the Indochina war, NBC stated:

"NBC believes that balanced presentation of contrasting views on the Indochina war can best be achieved through NBC news, discussion, and interview programs. This is in accord with FCC fairness doctrine under which broadcasters are called upon to make determination of formats, programs and spokesmen for presentation of contrasting views on controversial public issues." (NBC Telegram, April 12, 1971)

NBC added that it planned to broadcast a special "Loyal Opposition" program during prime evening time on April 30, 1971, and that a number of Democratic spokesmen would be afforded an opportunity to express their respective views on the President's Indochina address at that time.* (NBC Telegram, April 12, 1971)

On April 13, 1971, DNC filed a complaint with the FCC demanding equal time on the NBC network to respond to the President's Indochina address. (J.A. 11-20) DNC did not contend that NBC had failed to present contrasting views on the Indochina war. (J.A. 18) Indeed, DNC admitted that NBC's news programming following the President's Indochina address "contained balanced analyses by those who share the President's views as well as those who oppose them." (J.A. 18) Instead DNC contended that the Democratic Party had not been given an adequate opportunity "to state and defend, in an *unfettered* manner, its views in conflict with those of the President." (J.A. 18) (emphasis supplied)

The FCC's Memorandum Opinion and Order

On August 20, 1971, the FCC denied DNC's request for time to respond to the NBC interview of the President on the "Today" program and the ABC interview of the President by Howard K. Smith. (Pet., p. 45a) The FCC also denied DNC's request for time to respond on NBC and CBS to the President's Indochina address. (Pet., p. 45a)

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* On April 30, 1971, NBC did broadcast its "Loyal Opposition" program. (J.A. 50) The participants included six Democratic Senators who, at the time, were considered likely to run for President in 1972. (J.A. 50) Each was asked, among other things, to comment on President Nixon's decision not to set a definite date for total withdrawal from Vietnam. The same six Democratic Senators had appeared one week earlier on an ABC television program entitled "Indochina—Another View." No fairness complaint was filed against ABC, presumably because ABC gave DNC the opportunity to choose "appropriate" Democratic spokesmen, while NBC did not.

Citing its rulings in *Letter to Nicholas Zapple*, 23 F.C.C. 2d 707 (1970), and *Republican National Committee*, 25 F.C.C. 2d 739 (1970), *rev'd sub nom. on other grounds, Columbia Broadcasting System, Inc.* v. *FCC*, 454 F.2d 1018 (D.C. Cir. 1971), the FCC stated that the opposition party was not automatically entitled to time to respond to the President except where the President makes an appearance in the "political party" sense or where the President is a candidate for reelection. (Pet., pp. 50a-51a) All other Presidential appearances, the FCC stated, are subject only to general fairness requirements with respect to controversial issues covered:

> "Presidents and other public officials (*e.g.*, Governors, mayors) do report to the public, and such reports, as we have said, contribute to an informed citizenry. Of course, the officials in such reports are most often engaged in setting forth the wisdom of the particular actions on which the reports are given. But this does not mean that this is a political party appearance to which given equal opportunities 'is applicable.' If that were so, the Commission would have, in effect, amended the Communications Act to specify that equal opportunities applies to all appearance[s] of public officials. The Act, we believe, makes clear that it is fairness—not equal opportunities—which should govern here; and in any event, we believe it sound policy, for the reasons set forth in [*Committee for the Fair Broadcasting of Controversial Issues*, 25 F.C.C. 2d 283 (1970)] that this situation—appearances of public officials during non-election periods—should come under the fairness doctrine with respect to controversial issues covered." (Pet., p. 51a)

With respect to Presidential appearances such as the "Today" interview, the FCC stated:

> "The question * * * is whether on an overall basis the networks have afforded reasonable opportunity for the discussion of contrasting viewpoints on these

> varied issues. And in view of the overall programming of the three networks, it cannot be said that the 'sum total' of any of the networks' efforts failed to satisfy the requirements of the fairness doctrine." (Pet., pp. 53a-54a)

The FCC further stated that "in terms of prime time coverage of the Indochina war, there is no evidence that any of the networks has failed to afford reasonable opportunities for the presentation of contrasting views." (Pet., p. 54a)

The Court of Appeals' Opinion

The Court of Appeals unanimously affirmed the FCC's Memorandum Opinion and Order. (Pet., p. 1a) Rejecting DNC's claim that the fairness doctrine required an automatic right of reply to Presidential appearances, the Court of Appeals stated, "We cannot stress too strongly that this doctrine nowhere requires equality but only reasonableness." (Pet., p. 25a) Explaining that the fairness doctrine does not operate with the same mathematical precision as does the "equal opportunities" requirement of Section 315, the Court of Appeals stated:

> "By its very nature the fairness doctrine is one which cannot be applied with scientific and mathematic certainty. There is no formula which if followed will assure that the requirements of the doctrine have been met. Procedurally, the doctrine can only succeed when the licensee exercises that discretion upon which he is instructed to call upon in dealing with the coverage of controversial issues." (Pet., p. 17a)

The Court of Appeals added that it had "clearly stated time after time, *ad infinitum ad nauseam*, that the key to the doctrine is no mystical formula but rather the exercise of reasonable standards by the licensee." (Pet., p. 22a)

Responding to DNC's argument that the opposition party would always be the "appropriate" spokesman to respond to the President, regardless of the particular issue he discussed, the Court of Appeals stated:

> "Should this be DNC's manifest destiny we can find no reason to compel the networks to assist it. * * * At times the President speaks to crucial problems to which other groups are far more qualified to speak. DNC and its representatives have no greater claim to expertise in the area of the economy than the National Chamber of Commerce or the president of the New York Stock Exchange, and that is the point; crucial issues must be reasonably aired after consideration of the viewpoints of all significant factions. *This is a matter for licensee discretion and not automatic rule because the speaker is the President of the United States.*" (Pet., p. 36a) (emphasis supplied)

In rejecting DNC's claim for time to respond to the President's Indochina address and the ABC interview of the President by Howard K. Smith, the Court of Appeals held that while the fairness doctrine was applicable to Presidential appearances involving the discussion of controversial issues, DNC had failed to show a lack of balanced coverage on any of the issues discussed by the President. (Pet., pp. 27a-28a) The Court of Appeals noted that there was considerable room for licensee discretion in the presentation of contrasting viewpoints (Pet., p. 28a), and admonished that "[i]t is not * * * for the Commission or this court to encroach upon the discretion of the licensee in absence of an apparent abuse of this discretion." (Pet., p. 28a) With respect to the NBC interview of the President on the "Today" program, the Court of Appeals held that DNC was not entitled to "a right of reply to this type of personal interview of a non-candidate." (Pet., p. 27a)

Answering DNC's claim that the FCC's burden of proof requirement was unreasonable, the Court of Appeals held that the claim was barred by DNC's failure to raise the claim before the FCC (Pet., pp. 37a-38a), and that in any event, there was nothing unreasonable in placing the initial burden on the complainant in fairness doctrine cases. (Pet., p. 38a) The Court of Appeals also held that DNC's request for an evidentiary hearing was properly denied. (Pet., pp. 39a-40a) Finally, the Court of Appeals held that the Republican National Committee (hereinafter "RNC")—which had sought review of a different portion of the FCC's Memorandum Opinion and Order—had not made a sufficiently detailed showing to require the production of ABC's logs and other programming documents. (Pet., pp. 29a-33a)

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE FAIRNESS DOCTRINE DOES NOT REQUIRE THAT A LICENSEE MAKE EQUAL TIME AVAILABLE TO THE OPPOSITION PARTY EVERY TIME THE PRESIDENT APPEARS ON TELEVISION.

DNC's claim that the opposition party is entitled to equal time to respond to television appearances by the President finds no support in either the fairness doctrine—as interpreted by the FCC and this Court—or the First Amendment. In *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969), this Court held that the FCC's interpretation of the fairness doctrine is entitled to "great weight" and should be followed unless there are "compelling" indications that it is wrong. Here, the FCC, relying on 20 years of administrative experience and referring to the policy considerations set forth in its rulings in *Committee for the Fair Broadcasting of Controversial Issues*, *supra*, and *Republican National*

Committee, supra, has determined that the public interest would best be served by applying traditional fairness standards to Presidential appearances in non-election periods. Stripped of its shrill First Amendment rhetoric, DNC's only point is that the "equal opportunities" approach urged by DNC here and in two pending rule-making proceedings* would better serve the public interest. Where, as here, the FCC's determination is supported by reasons which are surely rational, there is simply no warrant for further review by this Court. As Mr. Justice Frankfurter stated in *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 224 (1943):

> "Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the 'public interest' will be furthered or retarded by the * * * [r]egulations. The responsibility belongs to Congress for the grant of valid legislative authority and to the Commission for its exercise."

See also *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192, 203 (1956) ("Courts are slow to interfere with [FCC's] conclusions when reconcilable with statutory directions."); *Neckritz* v. *FCC,* 446 F.2d 501, 502 (9th Cir. 1971) ("[A] court's role is limited to deciding whether the Commission's order is reasonable or in contravention of statutory purpose."); *Greater Boston Television Corp.* v. *FCC,* 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971) ("Assuming consistency with law and the legislative mandate, the agency has latitude not merely to find facts and make judgments,

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* See *Fairness Doctrine and Public Interest Standards: Notice of Inquiry Regarding Handling of Public Issues, Part V,* Docket No. 19260, FCC 71-623, 36 Fed. Reg. 11825 (1971); *Obligations of Broadcast Licensees Under the Fairness Doctrine: Notice of Proposed Rule Making,* Docket No. 18859, FCC 70-507, 35 Fed. Reg. 8720, 8834 (1970).

but also to select the policies deemed in the public interest.")

Clearly the FCC cannot be said to have acted arbitrarily in refusing to create an automatic right of reply to Presidential television appearances. The rationality of the FCC's action can be defended on the ground that Congress early considered and rejected the notion of equal opportunities for controversial issues (67 Cong. Rec. 12502-12504). Its rationality can be defended on the ground that the fairness doctrine is issue-oriented. See *Red Lion Broadcasting Co.* v. *FCC*, *supra*; *Green* v. *FCC*, 447 F.2d 323, 328 (D.C. Cir. 1971); see also Loevinger, *Free Speech, Fairness and Fiduciary Duty in Broadcasting*, 34 Law & Contemp. Prob. 278, 297 (1969). Its rationality can be defended on the ground that the Democratic Party will not always be the "appropriate" spokesman to respond to a Republican President on a particular controversial issue. Its rationality can be defended on the ground that no particular individual or group has the right to present the contrasting viewpoint, absent a personal attack or actual candidacy. See *Green* v. *FCC*, *supra*. As the FCC stated in *Boalt Hall Student Association*, 20 F.C.C. 2d 612, 615 (1969):

> "[T]he cornerstone of the fairness doctrine is not the right of any particular individual or group to speak but rather the public's right to be informed as to all significant points of view relating to an issue of public importance."

DNC's suggestion that its petition for certiorari should be granted because this Court recently agreed to review "related First Amendment issues" (Pet., p. 12) in *Business Executives' Move for Vietnam Peace* v. *FCC*, 450 F.2d 642 (D.C. Cir. 1971), *cert. granted sub nom. Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, Nos. 71-863, *et al.*, 40 U.S.L.W. 3410 (February 29, 1972) is ill-founded. In *BEM*, as the complainants

conceded, all of the requirements of the fairness doctrine had been fully complied with by the broadcast licensees involved. Given that fact, the central issue raised in *BEM* was whether the First Amendment compelled licensees who had complied with the fairness doctrine to sell advertising time to individuals or groups for brief "spot" announcements asserting their particular views. *BEM* did not involve any claim that the "equal opportunities" requirement of Section 315 should be extended to Presidential appearances in non-election periods. Nor did *BEM* involve any request for *free* television time. Moreover, in *BEM*, the Court of Appeals' decision was in square conflict with the decisions of the First and Third Circuits in *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950) and *McIntire* v. *Wm. Penn Broadcasting Co. of Philadelphia*, 151 F.2d 597 (3d Cir. 1945), *cert denied*, 327 U.S. 779 (1946). Here, as DNC recognizes, there is no such conflict.

In terms of basic fairness doctrine principles, the Court of Appeals' affirmance of the FCC's ruling in this case was quite unexceptionable. Unlike the "equal opportunities" requirement of Section 315, which requires absolute equality in the use of broadcast facilities by rival candidates, the fairness doctrine requires only that the licensee afford "reasonable opportunity" for the presentation of contrasting viewpoints. In *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598, 599 (1964), the FCC explained the distinction as follows:

> "While Section 315 * * * embodies both the 'equal opportunities' requirement and the fairness doctrine, they apply to different situations and in different ways. The 'equal opportunities' requirement relates solely to use of broadcast facilities by candidates for public office. With certain exceptions * * *, the law provides that if a licensee permits a person

who is a legally qualified candidate for public office to use a broadcast station, he shall afford equal opportunities to all other such candidates for that office in the use of the station.

* * *

"The fairness doctrine deals with the broader question of affording reasonable opportunity for the presentation of contrasting viewpoints on controversial issues of public importance. Generally speaking, it does not apply with the precision of the 'equal opportunities' requirement. Rather, the licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of the situation—as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to format and spokesmen to present the viewpoints, and all the other facets of such programming. * * * There is thus room for considerably more discretion on the part of the licensee under the fairness doctrine than under the 'equal opportunities' requirement."

See also *Committee for the Fair Broadcasting of Controversial Issues*, 25 F.C.C. 2d 283, 291-92 (1970).

In ignoring this distinction—a distinction recognized by this Court in *Red Lion*, *supra*, 395 U.S. at 369—DNC's claim distorts both the fairness doctrine and the "equal opportunities" requirement of Section 315. It distorts the fairness doctrine by putting the primary focus on the identity of the speaker rather than the issues he discusses. It distorts the "equal opportunities" requirement of Section 315 by imposing on the broadcast licensee an obligation to provide "equal time" for non-candidates engaged in non-campaigns during non-election periods.

As the Court of Appeals noted, DNC's claim that the fairness doctrine requires an automatic right to reply

to Presidential "personality appearances" such as the "Today" interview is frivolous. The fairness doctrine is concerned with issues, not personalities, and if no issues are discussed, plainly the doctrine does not apply. The inapplicability of the fairness doctrine to "this type of personal interview of a non-candidate" (Pet., p. 27a) should be obvious from the nature of the questions that were asked:

> "MISS WALTERS: Mr. President, I have read that you proposed to Mrs. Nixon the very first time that you met and that Mrs. Nixon turned you down at that time. What I want to ask you is how you think your life would have been different if she had not finally said yes. What has Mrs. Nixon herself contributed to your life?
>
> * * *
>
> "MISS WALTERS: I want to go back to what we were talking about in the very beginning, and that is the proposal on the first night that you met. That is a very impulsive thing to do, Mr. President, and you are not generally thought of as an impulsive man. Do you remember that evening and your mood?
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> * * *
>
> "MISS WALTERS: And while we are talking of marriages, Mr. President, how can I not ask you for some comment on what has been in the news every day, and that is perhaps the impending engagement for your daughter, Tricia?
>
> * * *
>
> "MISS WALTERS: * * * I want to talk a little bit about Washington wives, Washington political wives. They seem to fall in general into two categories, those who support their husbands' views, and remain rather silent about issues, and those who independently speak out on issues; those rare ones who do. What is your view of the politicians' wives'

role? Notice how I mention no names, Mr. President." *

Contrary to DNC's suggestion (Pet., pp. 13-15), neither the First Amendment nor the fairness doctrine requires that the "opposition party" receive exactly the same amount of television coverage as does the President. Such an approach would only serve to discourage licensees from broadcasting Presidential addresses and interviews. As the FCC stated in *Committee for Fair Broadcasting, supra:*

> "We do not believe that any extended discussion is needed as to why the licensee is afforded so much discretion under the fairness doctrine. In our judgment, based on decades of experience in this field, this is the only sound way to proceed as a general policy. A contrary approach of equal opportunities, applying to controversial issues generally the specific equal opportunities requirements for political candidates would in practice not be workable. It would inhibit, rather than promote, the discussion and presentation of controversial issues in the various broadcast program formats (e.g., newscasts; interviews, documentaries). For it is just not practicable to require equality with respect to the large number of issues dealt with in a great variety of programs on a daily and continuing basis. Further, it would involve this Commission much too deeply in broadcast journalism; we would indeed become virtually a part of the broadcasting 'fourth estate,' overseeing thousands of complaints that some issue had not been given 'equal treatment.' We do not believe that the profound national commitment to the principle that debate on public issues should be 'uninhibited, robust, wide-open' (*New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270) would be promoted by a general policy of requiring equal treatment on all such issues, with governmental inter-

* The transcript of the "Today" program was reprinted in full in Appendix A of NBC's Brief in the Court of Appeals.

vention to insure such mathematical equality." 25 F.C.C.2d at 292.

Surely the *Committee for Fair Broadcasting* approach—which was followed here by the FCC and approved by the Court of Appeals—is consistent with "the First Amendment goal of producing an informed public capable of conducting its own affairs." *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 392. DNC's contention that a different approach might better serve the end of fairness (Pet., pp. 16-19) does not raise any issues warranting review by this Court.

II. THE COURT OF APPEALS CORRECTLY HELD THAT DNC WAS NOT ENTITLED TO RAISE ITS BURDEN OF PROOF CLAIM FOR THE FIRST TIME ON APPEAL.

DNC also urges that review is required because the Court of Appeals' decision approved two "procedural barriers" which—according to DNC—deny fairness doctrine complainants "any semblance of procedural fairness." * (Pet., p. 19) In particular, DNC claims that the FCC has improperly allocated the burden of proof in fairness doctrine cases by placing the burden on the complainant rather than the licensee. (Pet., p. 19) DNC also claims that the FCC erred in refusing the Republican National Committee's request for ABC's logs and other programming documents. (Pet., p. 20) Neither claim warrants consideration by this Court.

DNC's burden of proof claim was raised for the first time in the Court of Appeals. (Pet., pp. 38a-39a) The claim was never raised before the FCC (Pet., p. 38a) and is therefore barred by Section 405 of the Communi-

* DNC does not now dispute the correctness of the Court of Appeals' holding that no evidentiary hearing was required to determine whether the networks had fulfilled their fairness obligations with respect to the Indochina war. (Pet., pp. 38a-40a)

cations Act. See 47 U.S.C. § 405; *Green* v. *FCC*, *supra*, 447 F.2d at 329; *Presque Isle TV Co., Inc.* v. *United States*, 387 F.2d 502 (1st Cir. 1967); *Florida Gulfcoast Broadcasters, Inc.* v. *FCC*, 352 F.2d 726 (D.C. Cir. 1965). In any event, there is nothing unreasonable in placing the burden on the party alleging a violation of the fairness doctrine. As the FCC stated in *Letter to Allen C. Phelps*, 21 F.C.C.2d 12, 13 (1969):

> "Absent detailed and specific evidence of failure to comply with the requirements of the fairness doctrine, it would be unreasonable to require licensees specifically to disprove allegations such as those made here. The Commission's policy of encouraging robust, wide-open debate on issues of public importance would in practice be defeated if, on the basis of vague and general charges of unfairness, we should impose upon licensees the burden of proving the contrary by producing recordings or transcripts of all news programs, editorials, commentaries, and discussion of public issues, many of which are treated over long periods of time."

See also *Hale* v. *FCC*, 425 F.2d 556, 558-59 (D.C. Cir. 1970).

DNC's claim that the FCC erred in refusing to compel the production of ABC's program logs is essentially a variation on the burden of proof theme. It does not merit review for the simple reason that ABC's logs were requested by RNC, not DNC. (Pet., p. 29a) In any event, the Court of Appeals' holding that ABC was not required to produce its logs was clearly correct. See *Letter to Robert G. Ryan*, 25 F.C.C.2d 884, 885 (1970).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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